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No. 88-2002

In The

Supreme Court of the United States

October Term, 1988

EMMA F. GILMERE,

Petitioner,

v.

CITY OF ATLANTA, GEORGIA,
R. C. SAMPSON and C. C. CRAIG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MARVA JONES BROOKS
City Attorney of Atlanta, Georgia
MARY CAROLE COONEY
(Counsel of Record)
Attorneys for Respondents
City of Atlanta and
R. C. Sampson
1100 South Tower
One CNN Center
Atlanta, Georgia 30303-2705
404/658-1150

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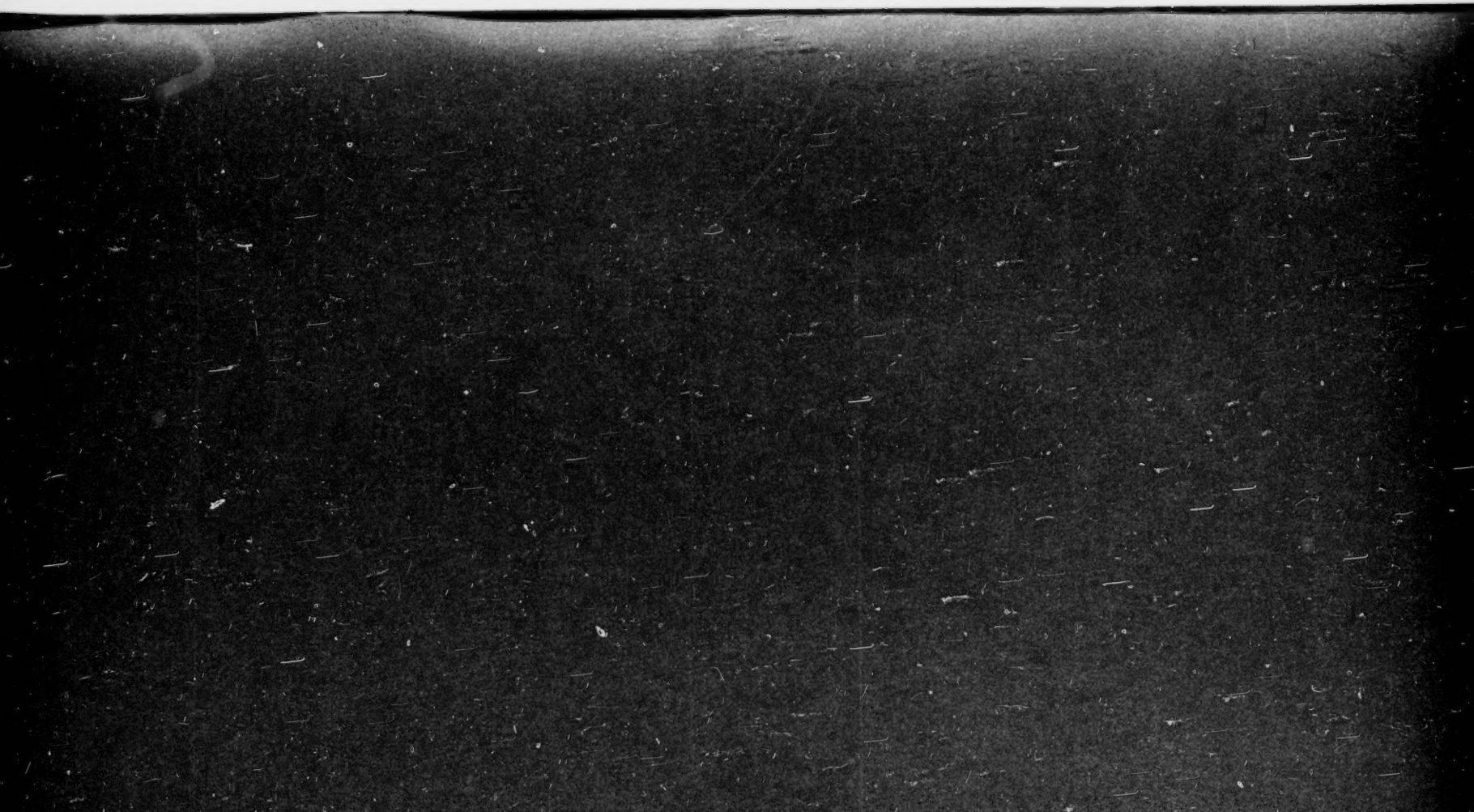


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No. 88-2002

In The

Supreme Court of the United States

October Term, 1988

EMMA F. GILMERE, individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin,

Petitioner,

v.

CITY OF ATLANTA, GEORGIA, R. C. SAMPSON and C. C. CRAIG, individually and in their official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, City of Atlanta, Georgia, and R. C. Sampson, respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Eleventh Circuit's opinion in this case. That opinion is reported at 864 F.2d 734 (1989).

STATEMENT

The facts recited in the petition for certiorari are, to a great extent, at variance with the findings of fact of the district court, which have been upheld on appeal by the Eleventh Circuit. Those findings of fact are set forth in full in Appendix I to the petition, and are summarized below. Respondent R. C. Sampson and C. C. Craig, officers of the Atlanta Bureau of Police Services, encountered petitioner's decedent, Thomas Patillo, at his home in response to a citizen's report that Patillo had threatened that citizen with a gun (Pet. 3a). The officers ordered Patillo to their police cars for questioning (Pet. 6a). Patillo, who was very drunk (Pet. 10A), attempted unsuccessfully to flee. The officers then escorted him forceably across a parking lot and, according to eyewitnesses, hit him about the head (Pet. 8-9a). As the three men reached a point between two parked cars, Patillo tried once more to break away, and reached for the revolver of one of the officers (Pet. 14a). Although reports of what happened next differed sharply, the trial court found that the revolver was knocked to the ground during a scuffle. *Ibidem*. Patillo then broke free and lunged toward Officer Sampson, who reacted by drawing his own revolver and shooting Patillo fatally. *Ibidem*. The trial court further found that Officer Sampson was attempting to protect himself, and was acting in subjective good faith (Pet. 39-40a) when he shot Patillo, but that his belief that his life was in danger was not reasonable (Pet. 41a). This finding resolves the "major factual hurdle" devised by the petitioner in footnote 2 to the petition. The remainder of the discussion within petitioner's footnote 2 contains mere inferences from matters never brought before the court below, nor properly presented for this Court's consideration.

As a matter of law, the trial court held that the respondents Sampson and the City of Atlanta had intentionally deprived Patillo of a protected liberty interest, the right to be free from the infliction of unnecessary physical force by state officers against one's person, and that this deprivation occurred both when Patillo was struck about the head and when he was shot. The trial court construed petitioner's pleadings as not claiming damages for the deprivation of Patillo's life (Pet. 75-89a).

Respondents Sampson and the City of Atlanta appealed this decision to the United States Court of Appeals for the Eleventh Circuit, and the petitioner cross-appealed. A three-judge panel of the appellate court reversed the trial court as to the finding of liability against the City of Atlanta, and held that the petitioner's action against the police officers did not state a claim under 42 U.S.C. § 1983 because the deprivation, although under color of state law, was caused by a random and unauthorized state act for which prior process is impracticable or impossible, and because post-deprivation remedies under state tort law were available to provide redress for the beating and the shooting. *Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir. 1984).

A suggestion for rehearing *en banc* was filed on behalf of the petitioner, and was granted. On October 15, 1985, the United States Court of Appeals for the Eleventh Circuit entered an order by which it affirmed the district court's holding that respondent Sampson and Officer Craig were liable for beating Patillo in violation of his constitutional rights, that Sampson was liable for shooting Patillo in violation of his constitutional rights, and that their supervisors were not liable under federal law for the officers' misconduct. The court reversed the finding of municipal liability, and remanded for further consideration of the petitioner's state law claims. The award of costs

and attorneys fees was vacated and remanded for further consideration. *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir., 1985).

Both the petitioner and respondent Sampson applied to this Court for a writ of certiorari. The petitioner's application at that time raised two of the issues contained in the pending Petition No. 88-2002: whether the courts below erred in failing to mandate the award of state statutory damages for the wrongful death of the petitioner's decedent, and whether an established municipal policy resulted in the death of and injuries to the petitioner's decedent, by which policy the City of Atlanta should have been held liable (*See*, Petition No. 85-1335). Both petitions were denied by this Court. *See, Gilmere v. City of Atlanta*, 476 U.S. 1115 (1986), and *Sampson v. Gilmere*, 476 U.S. 1124 (1986).

On remand, the trial court declined to award additional damages against respondents Sampson and Craig. The Court of Appeals for the Eleventh Circuit affirmed the damages award, and remanded the case for reconsideration of attorneys fees. It is the failure of the Court of Appeals to compel the award of additional damages, and to hold the City of Atlanta liable, which gives rise to the petition now pending before the Court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. *Facts Unique to This Case Render Inappropriate a Review of the Relevance of Georgia's Wrongful Death Statute to the Measure of Damages to be Awarded for a Section 1983 Claim*

The petitioner has raised two arguments for compelling the courts below to use Georgia's wrongful death statute[1] in determining the amount of damages to compensate her for the deprivation of the decedent's constitutional rights. The first is that binding precedent mandates the use of the state's statutory framework for awarding damages for federal claims. The second is that she properly pleaded a pendent state claim for wrongful death which itself would have authorized the award of damages under Georgia's wrongful death statute. These arguments are premised on issues unique to this case that do not warrant review by this Court.

The circumstances of her case and her own election of remedies, not the misapplication of federal law, form the basis of the ruling which the petitioner asks this Court to review. By her own election, the petitioner failed to plead a state cause of action for wrongful death, which failure deprives her of an arguably automatic[2] application of the Georgia measure of damages for wrongful death.

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[1] Georgia law permits recovery of the "full value of the life of the decedent" in actions for wrongful death. Official Code of Georgia Annotated §§ 51-4-5(a) and 51-4-1.

[2] The application of the wrongful death statute's measure of damages would not, as petitioner implies, have inevitably followed a determination that a pendent state cause of action for wrongful death had been stated. Had the cause of action for wrongful death been properly pleaded, sovereign immunity could have been raised as a defense by the City of Atlanta, pursuant to

This issue of pleading and practice was the subject of careful analysis by the trial court and by the Court of Appeals. The resolution of such an issue adverse to the petitioner does not raise a substantial federal question for this Court.

Whether the courts below were compelled to use the Georgia wrongful death statute as the measure of compensation for deprivation of federally-derived rights was an issue also determined by the petitioner's particular circumstances. While the trial court properly used as guidance the holding in *Carey v. Piphus*, 435 U.S. 247 (1978), that one of the purposes of Section 1983 is to provide compensation to citizens wronged by the deprivation of their constitutional rights, it went on to examine closely the application of that holding to the circumstances at hand. Those circumstances included the fact that the decedent's next of kin did not depend on him for financial support (Pet. 82a). The trial court's determination of damages was based on its calculation of adequate compensation to the decedent's estate for the constitutional rights violation the decedent suffered at the hands at the respondent police officers. *Ibidem*. The petitioner does not contend that the determination of adequate compensation is not within the trial court's discretion and authority. Indeed, cases cited by the petitioner show that state statutory frameworks for damages will be bypassed by federal courts, when necessary, to achieve adequate compensation to the victims of violations of constitutional rights (Pet. 27); *See, Bell v. City of Milwaukee*, 746 F.2d 1205, 1238 (7th Circuit 1984). It is the trial court's calculation of what is adequate compensation under the circumstances of this case, and not the applicable legal principle, with which the petitioner quarrels. The calcu-

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Official Code of Georgia Annotated § 36-33-3, and "official" immunity could have been raised by the officers. *See*, Official Code of Georgia Annotated § 36-33-4; *Craft v. Preble*, 182 Ga. App. 429, 355 S.E.2d 746 (1987).

lation undertaken in this case, which was reviewed at length and affirmed by the Court of Appeals (Pet. 119a-134a), does not present a substantial federal question for review by this Court.

2. *The Issue of the City of Atlanta's Liability, Having Been Reviewed Four Times on the Appellate Level, Presents No Substantial Important Federal Question*

The petitioner's argument that the judgment against respondent police officers should be made payable by the City of Atlanta steadfastly ignores well-established precedent that the liability of a governmental entity cannot be based solely on the theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The judgment in favor of the City of Atlanta in this case was determined by the Eleventh Circuit on appeal, and affirmed twice. *See, Gilmere v. City of Atlanta*, 737 F.2d 894 (11th Cir., 1984) (vacated); on rehearing 774 F.2d 1495 (11th Cir., 1985); *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir., 1989). It was also the subject of the petitioner's previous application for writ of certiorari. *See*, No. 85-1335, *Gilmere v. City of Atlanta*, 476 U.S. 1115 (1986) (cert. denied). Most recently, as acknowledged by the petitioner, the Eleventh Circuit characterized pursuit of this argument as "frivolous." Petitioner asks this Court to order the City of Atlanta to pay the judgment, all costs and attorneys fees awarded in this case, despite the fact that the City was specifically held not to be liable to the petitioner. There is simply no law that supports such a proposition, and no important federal, or indeed, legal, question is presented to this Court for review on this issue.

3. *Petitioner has Failed to Present her Petition With Brevity, in Accordance With the Rules of This Court.*

Respondents point out that the text of the petition presented in this application for certiorari exceeds the maximum number of pages, as set out in Rule 21.4 of the Rules of the Supreme Court of the United States, by at least thirteen pages, and that Rule 21.5 makes such failure to present the petition with brevity a sufficient reason for denial. The respondents ask this Court to consider such failure as sufficient reason for declining to review this case.

CONCLUSION

The petition for writ of certiorari in No. 88-2002 should be denied.

Respectfully submitted,

MARVA JONES BROOKS,
City Attorney of
Atlanta, Georgia

By:
MARY CAROLE COONEY,
Deputy City Attorney
(Counsel of Record)

Attorneys for Respondents
City of Atlanta and
R. C. Sampson

1100 South Tower
One CNN Center
Atlanta, GA 30303-2705
404/658-1150

July 5, 1989

APPENDIX

OFFICIAL CODE OF GEORGIA ANNOTATED

§ 36-33-3. A municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law.

§ 36-33-4. Members of the council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as the result of any official act of such officers if done oppressively, maliciously, corruptly, or without authority of law.

§§ 51-4-1. As used in this chapter, the term:

(1) "Full value of the life of the decedent, as shown by the evidence" means the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived.

(2) "Homicide" includes all cases in which the death of a human being results from a crime, from criminal or other negligence, or from property which has been defectively manufactured, whether or not as the result of negligence.

§ 51-4-5. (a) When there is no person entitled to bring an action for the wrongful death of a decedent under Code Section 51-4-2, 51-4-3, or 51-4-4, the administrator or executor of the decedent may bring an action for and may recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent.